INDEX

CITATIONS

Cases:

Statutes:

Congressional Materials:

Miscellaneous:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 74

FEDERAL TRADE COMMISSION, *Petitioner*

v.

HENRY BROCH & COMPANY, *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

PRELIMINARY STATEMENT

This case lays open the current practice of the Federal Trade Commission in Robinson-Patman Act cases to issue blanket orders to cease and desist in the broad words of the statute, which perpetually enjoin the respondent to obey a vague statutory provision, on pain of contempt or penalty proceedings, without providing any guideposts for compliance beyond the perplexing text of the statute itself.

As exemplified by this case, such enigmatic orders not only compel the respondent to compete at his peril, but inevitably shift to the courts in enforcement proceedings the agency's duty to apprise respondents how to conduct their business in compliance with the law.

OPINION BELOW

The order of the Court of Appeals on remand, modifying and affirming as modified the order to cease and desist, is reported at 285 F.2d 764 (1960).

QUESTION PRESENTED

Section 11 of the Clayton Act as amended, 15 U.S.C. § 21 (1958), authorizes the Federal Trade Commission, after due administrative notice and hearings, to adjudge violations of the substantive prohibitions of the Act, including Section 2(c)'s ban on illicit brokerage transactions, and to issue orders "to cease and desist from such violations" found. Section 11 also provides that any party subject to an order to cease and desist may petition for review by a Court of Appeals, which thereupon shall have "jurisdiction to affirm, set aside, or modify the order of the Commission * * *."

In the instant case, a Commission complaint, advancing a legal theory of first impression, charged that one specific transaction by respondent on behalf of a particular seller with a particular buyer constituted an illicit brokerage payment in violation of Section 2(c). At the close of its administrative proceeding which was contested by respondent at every stage, the Commission issued an order to cease and desist which not only enjoined respondent from the same or related acts, but sweepingly enjoined respond-

ent from violating Section 2(c) with respect to "*any*" seller or "*any*" buyer and in "*any other manner*."[1]

Upon remand from this Court's decision on the merits reversing the Court of Appeals' interpretation of Section 2(c), the Court of Appeals denied respondent's motion to set aside or modify the order to cease and desist or to remand for further administrative reconsideration by the Commission, which was answered by the FTC's request for summary affirmance of the order. *Sua sponte*, however, the court below granted partial relief by limiting the application of the order, as affirmed, to brokerage transactions among the parties implicated by the evidence adduced at the administrative hearing.

Accordingly, the question presented is whether the Court of Appeals on remand abused its statutory

---

[1] *In haec verba*, the order prohibits respondent "in connection with the sale of food or food products for Canada Foods Ltd., or *any other seller principal*," from "(1) Paying, granting or allowing, directly or indirectly, to The J. M. Smucker Company, or to *any other buyer*, or to anyone acting for or in behalf of or who is subject to the direct or indirect control of such buyer any allowance or discount in lieu of brokerage, or any [illegible] percentage thereof, by selling any food or food [illegible] such buyer at prices reflecting a reduction from the prices at which sales of such foods are currently being effected by respondents for Canada Foods Ltd. or any other seller principal, as the case may be, where such reduction in price is accompanied by a reduction in the regular rate of commission, brokerage or other compensation currently being paid to respondents by such seller principal for brokerage service; *or* (2) *In any other manner*, paying, granting or allowing, directly or indirectly, to The J. M. Smucker Company, or to *any other buyer*, or to anyone acting for or in behalf of or who is subject to the direct or indirect control of such buyer, anything of value as a commission, brokerage or other compensation or any allowance or discount in lieu thereof upon, or in connection with, *any* sale of food or food products to such buyer for its own account." 69 F.R. 202, 204-205. Emphasis added.

powers of review by modifying a blanket order to cease and desist arising out of a narrow and sharply contested administrative proceeding—in light of the law of the case as enunciated by this Court's decision on the merits, and in view of the Commission's refusal to reconsider or justify the basis for its order.

STATEMENT

From the outset, this case concerned *solely* respondent's actions as a broker in negotiating sales of apple concentrate on behalf of one seller-principal, Canada Foods, Ltd., with one buyer, the J. M. Smucker Company.

After investigating respondent's files and business records, the Commission discovered only one transaction raising legal questions under Section 2(*c*) of the Robinson-Patman Act (O.R. 21-24), which became the basis of its formal complaint. (O.R. 3) As issued, the complaint charged respondent with a violation of Section 2(*c*) by having "granted and allowed a buyer a certain percentage, approximately 60 percent, of the brokerage fee or commission paid by the seller-principal for services by respondents in connection with such sale" in 1954. (O.R. 3) After detailing the circumstances of this one transaction, the complaint specified that "This transaction in the conduct of respondents' business is challenged by the complaint herein." (O.R. 4) With respect to respondent's remaining business on behalf of twenty-five other seller-principals, the complaint stated that "This phase of said respondents' business is not challenged * * * herein." (O.R. 3)

At all times, respondent contested the Commission's charges—including the filing of pleadings, presenting

of evidence and appealing adverse rulings up to this Court.

Specifically, respondent filed Proposed Findings of Fact, Conclusions of Law, and Order with the FTC hearing examiner. (O.R. 169) Respondent maintained that his acceptance of a 3% rather than 5% commission was based on the economies of handling this "unusually large" order which permitted him to make more than on a number of small orders, and also that "there were definite savings to the seller in the handling and processing of such a large order." (O.R. 170, 172) Moreover, respondent stressed the disparities in the brokerage rates paid by the seller, and showed that his own commissions varied from 1% to 5%, sometimes fluctuating "according to volume and selling price of products." (O.R. 22, 189) Accordingly, respondent requested entry of an order dismissing the Commission's complaint. (O.R. 173)

Rejecting respondent's proposed findings, conclusions and order, the FTC hearing examiner filed an Initial Decision which adjudged a violation of Section 2(c) based solely on respondent's "dropping of commission on sales to a single purchaser," *i.e.*, the Canada Foods/Smucker transaction. (O.R. 199-200) The Initial Decision thereupon entered a blanket order to cease and desist, which perpetually enjoined respondent from violating Section 2(c) with respect to *any* seller and *any* buyer in *any* manner.[2] In effect, paragraph 1 of the order barred respondent from ever accepting a smaller rate of commission at the same time as the seller lowers his price to the buyer. Paragraph 2 barred respondent from ever violating the

[2] For text of order, see note 1 *supra*.

statutory provision in "any other manner." (O.R. 202)

Respondent "appealed" the hearing examiner's Initial Decision to the full Commission, pursuant to the FTC's Rules of Practice.[3] Respondent contested the Initial Decision by reference to "basic legal questions" including the "public interest" aspects of "a formal proceeding based on an isolated transaction of *de minimis* scope" (R. 6), maintained that no Section 2(c) violation could arise from price reductions based on cost and competitive factors (R. 14-15), and challenged the "law of this case" holding brokers' commissions "immune from adjustment in the course of negotiations." (R. 18) Finally, respondent pointed to the conflict with overall antitrust policy created by such a "freeze" on brokerage rates, stressing that "Section 11 of the Clayton Act expressly declares that no Commission order 'shall in any wise relieve or absolve any person from any liability under the antitrust Acts.'" (R. 19)

Rejecting respondent's appeal from the Initial Decision and Order, the Commission adopted the hearing examiner's findings, conclusions and order to cease and desist. (O.R. 204-211) In its opinion as well as in paragraph 1 of its order, the Commission treated respondent's lower rate of commission on the occasion of the seller's contemporaneous price reduction as tantamount to an illicit payment of brokerage by re-

[3] The Commission's rules at that time required no filing of "exceptions" as per the practice before the National Labor Relations Board detailed by its brief in *National Labor Relations Board* v. *Ochoa Fertilizer Corp.*, No. 37, this Term, pp. 3, 27-29, and *now* contained in the Federal Trade Commission Rules of Practice as revised this year. 3 CCH Trade Reg. Rep. ¶9821.23 (1961).

spondent in violation of Section 2(c) (O.R. 209), and held immaterial any cost or competitive considerations bearing on the legality of the seller's price. (O.R. 210)

Respondent declined compliance with the Commission's order, and filed a Petition to Review and Set Aside Order of the Federal Trade Commission in the Court of Appeals. (O.R. 211-212) This petition challenged the Commission's application of Section 2(c), the factual and legal basis of its rulings, and concluded that "The order of the Commission is defective in that it is vague, exceeds the statutory limits of Section 2(c), and as applied would conflict with the Sherman Act." (O.R. 214)

The Court of Appeals unanimously set aside the Commission's order,[4] holding Section 2(c) inapplicable to independent sellers' brokers such as respondent, and concluding that no illicit brokerage payment resulted from the reduction in respondent's brokerage commission contemporaneous with the seller's price reduction. (O.R. 222-224) 261 F.2d 725. Also, noting that the FTC "did not proceed against the buyer or the seller," the court expressed doubt as to the public interest of proceeding against a "private grievance between rival brokers," and observed that

> "The effect of respondent's order is that the commissions of a seller's broker are rendered immune

[4] In its briefs, respondent reiterated its prior contentions, stressed the incompatibility of the sweeping ban of the order with the Federal Trade Commission's qualified rationalization of the scope of Section 2(c) (Reply Br., pp. 7-8), pointed to the isolated nature of the transaction at issue (Br., p. 30; Reply Br., p. 7), and attacked the "Commission's novel statutory interpretation, apparent from the face of its order." (Reply Br., p. 16) Respondent specifically noted the order's broad prohibition on price reductions to "any other buyer." (Reply Br., p. 7)

> from reduction by the seller when it is negotiating for the sale of its food products, and hence such a reduction, when used as a basis for quotation of a lower price, is illegal." (O.R. 223)

By a 5:4 decision on June 6, 1960, this Court reversed the statutory interpretation of Section 2(c) by the court below, 363 U.S. 166, and remanded for further proceedings consistent with the opinion. In the face of a dissenting opinion by four Justices which expressed concern that "all legitimate commission rates are frozen in destruction of competition, and in actual violation of the antitrust laws," 363 U.S. at 180, the majority opinion stressed the precise focus of its holding:

> "This is not to say that every reduction in price, coupled with a reduction in brokerage, automatically compels the conclusion that an allowance 'in lieu' of brokerage has been granted. As the Commission itself has made clear, whether such a reduction is tantamount to a discriminatory payment of brokerage depends on the circumstances of each case." *Id.* at 175-176.

The majority also cautioned that the "seller and his broker can of course agree on any brokerage fee that they wish," *id.* at 170, and disclaimed "an absolute rule that § 2(c) is violated by the passing on of savings in broker's commissions to direct buyers, for here, as we have emphasized, the 'savings' in brokerage were passed on to a single buyer who was not shown in any way to have deserved favored treatment." *Id.* at 177 n. 19. Moreover, the majority opinion observed that

> "There is no evidence that the buyer rendered any services to the seller or to the [broker] nor that anything in its method of dealing justified its getting a discriminatory price by means of a reduced

brokerage charge. We would have quite a different case if there were such evidence and we need not explore the applicability of § 2(c) to such circumstances." *Id.* at 173.

Following the remand, respondent requested the Court of Appeals, *inter alia*, to modify the cease and desist order, or to remand to the Commission for its further administrative consideration, since this Court's opinion demonstrated that there was "no proper foundation for the Commission's order to cease and desist." (R. 25) Respondent's motion emphasized the conflict with this Court's opinion created by the broadside prohibition of the FTC's order on brokerage transactions by respondent on behalf of *all* sellers with *all* buyers in *any manner*, in disregard of the cost and other circumstances stressed by this Court's opinion as potentially creating "quite a different case." (R. 25-26) Respondent also cited this Court's supervening decision in *Communications Workers of America* v. *National Labor Relations Board*, 362 U.S. 479, 481 (1960), which modified a sweeping Labor Board order in the absence of any "generalized scheme" of illicit activity to support an omnibus injunction reaching conduct toward "any other employer." (R. 26-27) Respondent twice suggested the alternative of a remand to the FTC for any further appropriate administrative consideration. (R. 29, 49-50) [5]

Disputing the Court of Appeals' *power to entertain* respondent's contentions, and without reconsidering or

---

[5] Respondent stated that "If the Court should conclude that the issues tendered * * * were not sufficiently explored by the Commission at the administrative level, the proper course would be to remand to the Commission for further appropriate consideration, rather than to foreclose all opportunity for a ruling on the merits." (R. 49-50)

even explaining the basis of its order, the FTC twice requested summary affirmance.[6] The Court of Appeals denied respondent's motion, but *sua sponte* modified the order so as to delete its references to "any other" sellers or buyers, and thereupon entered a decree of affirmance. (R. 51-52) 285 F.2d 764.[7]

SUMMARY OF ARGUMENT

After a sharply contested administrative hearing about one arrangement by respondent in negotiating a sale of apple concentrate on behalf of one particular seller principal with one particular buyer, which gave rise to a legal issue of first impression under Section 2(c) of the Robinson-Patman Act, the FTC entered a blanket order perpetually enjoining respondent from ever violating Section 2(c) with respect to any other sellers and buyers and in any manner whatsoever. Upon remand from this Court's decision on the merits in 1960, which exposed important deficiencies in the FTC's unqualified order, the Court of Appeals partially modified the order by confining its application to transactions among the parties implicated by the record, in the absence of any justification by the FTC for the sweeping nature of its prohibition.

Without appropriate modification, the order would jeopardize respondent's entire business. It would not

---

[6] See R. 35-37 and also the Commission's Memorandum in Opposition to Petitioner's Motion to File Reply to Respondent's Answer, dated Nov. 2, 1960, pp. 4-5.

[7] Contrary to the Commission's brief, the court below did not grant "precisely the relief sought by Broch's motion to modify" (Br., p. 8), since the modified order exposes all Canada Foods' Smucker transactions by respondent to unqualified prohibitions ignoring cost and other considerations which could establish their legality under the criteria of this Court's opinion. See Note, 45 Minn. L. Rev. 659, 668 n. 43 (1961).

only bar reductions in respondent's rate of commission made competively to gain a particular buyer's account, but would also outlaw any permanent arrangement whereby respondent accepted a smaller rate of commission on sales in which the seller quotes a lower price to the buyer. Although the seller's lower price might be entirely lawful, respondent would nonetheless stand in violation of the order. The order would also prohibit arrangements with any buyer even though he "rendered any services to the seller or to the respondent" or whose "method of dealing" warranted a reduction in the brokerage charge—"circumstances" which this Court's opinion excepted as presenting "quite a different case." Further, as originally issued by the FTC, the order omits the statutory exception of payments made "for services rendered," and could even reach uniform reductions in respondent's brokerage fee *in the absence of any discrimination among buyers*—a liability which this Court's opinion characterized as "absurd."

Judicial modification of blanket and factually unsupported orders in no way usurps the FTC's initial responsibility for fashioning orders to cease and desist, but rather implements the reviewing court's obligation to supervise orders which ultimately become orders of the court itself. Section 11 of the Clayton Act expressly grants Courts of Appeals "jurisdiction to affirm, set aside, or modify" orders of the Federal Trade Commission upon review. In short, the partial modification of the instant order by the Court of Appeals comports with conventional principles governing judicial review of FTC orders, and does no more than relate the terms of the order to the scope of the administrative proceeding.

While blanket orders *might* be appropriate if violations are not contested or amount to a "generalized scheme" of misconduct, orders should normally follow the nature of the pricing practices found unlawful—lest the Commission shift its duty of informing respondents how to comply with the law to the courts in enforcement proceedings, while forcing respondents to compete at their peril.

Wholly apart from the undoubted power of supervision vested in the Courts of Appeals to modify unduly broad orders, on the record in this case there can be no claim that respondent was precluded from urging modification of the order by reason of lack of a so-called "particularized objection." Not only did respondent challenge the premises behind the order at every step of this proceeding, but the Commission admits that it did in fact "address itself to the scope of" the instant order, and indeed declined further opportunities to do so.

Actually, even in the absence of prior specific objection to the scope of the order at the administrative level, reviewing courts in contested proceedings have often revised unjustifiably broad orders—as the Commission now admits.

ARGUMENT

A. The Commission's Blanket Order Far Exceeds the Narrow Compass of This Case, and Jeopardizes Respondent's Entire Business.

As fashioned by the FTC, the order perpetually enjoins respondent from in any manner violating the Brokerage Clause with respect to any *seller* and any *buyer*, even though the sole controversy here concerned one particular seller/buyer transaction. Indeed, the complaint affirmatively excepted respondent's business with his twenty-five other seller-principals (O.R. 3).

accentuating that *no other* aspect of respondent's business with anyone else raised any legal questions under the Act. Lest any doubt exist on this score, testimony by a Commission representative *disproved* any other possible violation beyond the single Canada Foods Smucker price-commission arrangement which was ultimately adjudged violative of Section 2(c). (O.R. 20-21, 24)

The universal sweep of the order respecting transactions with any other sellers and any other buyers is compounded by its further unqualified ban on conduct beyond the scope of the Act as construed by this Court. As detailed above, the sole controversy in this case related to respondent's conduct in a single seller buyer transaction by accepting a smaller rate of commission when the seller lowered his price to this one buyer. This Court's opinion on the merits carefully disclaimed any "absolute rule that § 2(c) is violated by the passing on of savings in broker's commissions to direct buyers, for here, as we have emphasized, the 'savings' in brokerage were passed on to a single buyer who was not shown in any way to have deserved favored treatment." 363 U.S. at 177 n. 19.

The FTC's blanket order defeats those assurances.

Paragraph 1 not only bars a commission reduction made *ad hoc* to gain a buyer's account, but also outlaws any *permanent* arrangement whereby respondent accepts a smaller rate of commission on larger sales in which the seller quotes a lower price to the buyer. Although the seller's lower price might be fully justified by cost savings or otherwise within the legal requirements of the Act, respondent would nonetheless stand in violation of the order. On top of this, the

order would also prohibit arrangements with any buyer even though he "rendered any services to the seller or to the respondent" or whose "method of dealing" warranted a reduction in the brokerage charge—the very "circumstances" which this Court excepted as presenting "quite a different case." 363 U.S. at 173.

Nor are these the only vices of the order. Still greater perils are posed by paragraph 2 which simply enjoins Section 2(c) violations "in any other manner." This paragraph not only omits the statutory exception of payments made "for services rendered," but exposes respondent to pains and penalties for any other activities transgressing this notoriously obscure proscription. In light of the Commission's consistent ban on the reflection of brokerage reductions in the form of lower prices,* this prohibition could reach even a uniform reduction in his broker's fee *in the absence of any discrimination among buyers*—a liability which this Court's opinion deemed "absurd." 363 U.S. at 176.

Nor is respondent's jeopardy dispelled by the Commission brief's equivocal hints (Br., p. 30 n. 13) that the order may not really mean what it says. Respondent can surely derive no comfort from ambiguous as-

---

* *E.g., Howard E. Jones & Co.*, 31 F.T.C. 1538 (1940); *Glover & Wilson*, 39 F.T.C. 485 (1944); *G. B. Shelton Brokerage Co.*, 42 F.T.C. 114 (1946); *C. C. Waddill Co.*, 42 F.T.C. 125 (1946); *Phillips Sales Co.*, 42 F.T.C. 132 (1946); *Paul Pankey & Co.*, 42 F.T.C. 148 (1946); *William R. Hill & Co.*, 42 F.T.C. 173 (1946); *Southern California Fish Corp.*, 42 F.T.C. 180 (1946); *Del Mar Canning Co.*, 42 F.T.C. 188 (1946); *Horden Food Products Corp.*, 42 F.T.C. 196 (1946); *Sebastian-Stuart Fish Co.*, 42 F.T.C. 202 (1946); *Custom House Packing Corp.*, 43 F.T.C. 164 (1946); *Haines City Citrus Growers Ass'n*, Dkt. No. 7144 (June 29, 1960).

surances as to any special meaning of "the order in its relation to the circumstances of this case" (Br., p. 30 n. 13), which are belied, for example, by Commission decisions holding that discrimination is *not* necessary to make out a Brokerage Clause violation. *E.g., Venus Foods, Inc.*, Dkt. No. 7212, p. 8 (Oct. 28, 1960). Nor can respondent rely on elusive guarantees that "there is nothing in the order indicating that any such circumstances * * * [as the buyer's performance of services ordinarily performed by the broker], to the extent they might be relevant, would not be considered in determining whether the order had been violated" (Br., p. 31 n. 13)—for such buyer services are regularly ruled out as immaterial in Section 2(c) proceedings. *E.g., Southgate Brokerage Co.* v. *Federal Trade Commission*, 150 F.2d 607 (4th Cir. 1945), *cert. denied*, 326 U.S. 774 (1945).

Actually, the Commission brief's *ad hoc* qualifications only document the basic vice of vague and sweeping FTC orders, whose meaning recedes as they approach judicial review. To be sure, respondent might contest an enforcement proceeding by reference to this Court's opinion as a gloss on the order. But this potential defense in enforcement proceedings does not significantly alter the "material difference between enjoined and non-enjoined * * * activities." *May Department Stores Co.* v. *National Labor Relations Board*, 326 U.S. 376, 388 (1945). Above all, as this Court has cautioned, such bifocal orders inevitably "shift to the courts a responsibility in enforcement proceedings" of resolving "issues which Congress has primarily entrusted to the Commission." *Federal*

Trade Commission v. *Morton Salt Co.*, 334 U.S. 37, 54 (1948).[9]

In all events,

> "A party is entitled to a definition as exact as the circumstances permit of the acts which he can perform only on pain of contempt of court. Nor should he be ordered to desist from more on the theory that he may violate the literal language and then defend by resort to the Board's construction of it. Courts' orders are not to be trifled with, nor should they invite litigation as to their meaning. It will occur often enough when every reasonable effort is made to avoid it. Where, as here, the literal language of the order goes beyond what the Board admits was intended, correction should be made." *J. I. Case Co.* v. *National Labor Relations Board*, 321 U.S. 332, 341 (1944).[10]

As this record shows, respondent's perils under the order are not fanciful but real. The evidence discloses transactions by respondent varying his commission rates with price and quantity (O.R. 22, 189), which might contravene the flat ban of the order. The order also penalizes respondent's future representation of Canada Foods in sales to Smucker, since respondent's 3% commission arrangements are outlawed irrespective of cost or any other justification which could hereafter support a lower price by the

---

[9] For similar recent judicial criticism of FTC orders, see *Swance Paper Corp.* v. *Federal Trade Commission*, 291 F.2d 833, 838 (2d Cir. 1961); *Asheville Tobacco Board of Trade, Inc.* v. *Federal Trade Commission*, 1961 CCH Trade Cases ¶70,113, p. 75,387 (4th Cir. Sept. 20, 1961).

[10] During oral argument in one case, this Court directed FTC counsel "to submit a statement on behalf of the Commission setting forth its view as to the scope of the disputed paragraph of the cease and desist order," which was then incorporated in the Court's opinion. *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 426 n. 5, 431 (1957).

seller to Smucker.[11] Notably, the very provisions of paragraph 2 of the order recently caused a criminal contempt conviction of another food broker, charged with granting a price reduction to a buyer. *In re Whitney & Co.*, 273 F.2d 211 (9th Cir. 1959).

Basically, the FTC order jeopardizes respondent's entire brokerage business. A seller-principal wishing to lower its price to a particular account and correspondingly to reduce his broker's commission can safely make such a deal by switching to a *new* broker—but not with respondent. For under the order's constraints, respondent is barred from accepting a lower commission when the seller lowers his price, and cannot even meet competitive fee arrangements which take away his business.[12]

There is, of course, no doubt that the Commission need not "confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity." *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473 (1952).[13] For "those caught violating the Act must expect some fencing in." *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 431 (1957); *cf. Federal Trade Commission* v. *Mandel Brothers*,

---

[11] See Note, 45 Minn. L. Rev. 659, 668 n. 43 (1961).

[12] The Commission takes the position that the meeting of competition is not a defense for a respondent under the Brokerage Clause. (O.R. 210).

[13] A principle consistently followed by the court below. *Eg., E. Edelmann & Co.* v. *Federal Trade Commission*, 239 F.2d 152, 156 (7th Cir. 1956), *cert. denied*, 355 U.S. 941 (1958); and most recently, *Wilson & Co.* v. *Benson*, 286 F.2d 891, 896 (7th Cir. 1961).

Inc., 359 U.S. 385, 393 (1959) ("prophylactic and preventive measure" permissible in view of "extensive" and "substantial" violations.)

But, as this Court has emphasized, the Commission's orders should be "specifically aimed at the pricing practices found unlawful." *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 52 (1948). Particularly in the sphere of competition is it imperative "that the decree be as specific as possible, not only in the core of its relief, but in its outward limits, so that parties may know their duties and unintended contempts may not occur." *International Salt Co.* v. *United States*, 332 U.S. 392, 400 (1947). Above all, the fact that a violation of law has been adjudged "does not justify an injunction broadly to obey the statute and thus subject the defendant to contempt proceedings if he shall at any time in the future commit some new violation unlike and unrelated to that with which he was originally charged." *National Labor Relations Board* v. *Express Publishing Co.*, 312 U.S. 426, 435-436 (1941); *cf. Hartford-Empire Co.* v. *United States*, 323 U.S. 386, 409-410 (1945).

Indeed, "Congress expected the Commission to exercise a special competence in formulating remedies to deal with problems in the general sphere of competitive practices." *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473 (1952).[14] It surely mocks the FTC's "special competence" to promulgate sweeping and universal orders which merely paraphrase

---

[14] In *Ruberoid*, the Court permitted the implicit inclusion in FTC orders of the *specific* statutory provisos, without sanctioning blanket prohibitions of obscure meaning.

Section 2(c)'s text, and then shift to the courts the task of fathoming their meaning.[15]

B. The Partial Modification of the Order by the Court of Appeals, Conforming With Judicial Precedents, Reconciles Fairness With Enforcement Efficiency.[16]

Upon this Court's remand for further proceedings consonant with its opinion on the merits, the Court of Appeals modified one dimension of the order but affirmed the other dimension intact.

Respondent's post-remand motion challenged the sweep of the order in light of this Court's disposition on the merits, in two distinct dimensions: (1) the order's *unqualified* prohibition of brokerage fee reductions coupled with lower prices, contrary to this Court's exception of such transactions based on legitimate cost and other considerations, and the opinion's insistence on arrangements productive of price discrimination favoring a particular buyer; and (2) the

---

[15] See Report of the Attorney General's National Committee to Study the Antitrust Laws 169-170 (1955): "We recommend that the Commission devote serious effort to vindicate its expert administrative status through precision in the mandates its orders impose. • • • Such carefully formulated orders would achieve their legitimate task of terminating illegal discriminations, without unduly obstructing a seller's future flexibility in adjusting his prices to business developments—a process essential to effective functioning of a free market economy." See also H. R. Rep. No. 580, 86th Cong., 1st Sess. 6 (1959), considering the recently amended enforcement provisions of the Clayton Act, and admonishing the FTC to "make a continuous effort to issue orders that are as definitive as possible."

[16] Respondent's motion alternatively requested the Court of Appeals to remand the case to the Commission for its reconsideration of the order (R. 29, 49-50), but such action was stymied by the Commission's request for summary judicial affirmance of the order's original text. (R. 37) See note 6 *supra*.

order's *universal* reach to brokerage transactions involving *any seller* and *any buyer*, notwithstanding the narrow compass of this case confined to respondent's Canada Foods/Smucker transaction.

The Court of Appeals' modification only limited the order's second dimension, but affirmed the broad and unqualified prohibition on respondent's transactions with Smucker on behalf of Canada Foods.[17]

The court's partial modification properly confined the injunction to the controversy and findings at bar—in the absence of any explanation or justification by the FTC for the unqualified sweep of its order. At no time did the Commission condemn or even question any transaction by respondent other than his fee reduction upon Canada Foods' lower prices to Smucker, and an examination of respondent's books by Commission representatives disclosed no trace of any other possible dereliction. (O.R. 21, 24)[18] Moreover, the *single* arrangement ultimately adjudged unlawful occurred in a

---

[17] Compare *Swance Paper Corp.* v. *Federal Trade Commission*, 291 F.2d 833, 838 (2d Cir. 1961) (judicial modification of broad order in language of Section 2(d) so as to confine it to the *specific promotional practice* found to violate the statute, although reaching transactions with all competing customers). *Swance* was recently followed by one Initial Decision limiting the Section 2(d) order to the same *specific promotional practice*, and with respect to the *single product* cat food in a diversified seller's line. *Quaker Oats Co.*, Dkt. No. 8119 (Sept. 8, 1961).

[18] Counsel's conjectural rationalizations for the order in their brief (pp. 31-37), not only highlight the striking lack of any prior explanation by the FTC, but are contrary to the evidence which affirmatively *refutes* any asserted "willfulness of the violation" or claim that "the particular violation found was not unique or limited to Broch's dealings with Canada Foods and Smucker, but was of a kind likely to be repeated in other transactions if not prohibited." Compare FTC Br., p. 32, with FTC testimony at O.R. 19-21.

borderland area of the law which pitted the Justice Department against the FTC,[19] and ultimately produced a 5:4 decision by this Court.

The Court of Appeals' partial modification of the order accords with judicial precedent as well as with the FTC's own prior orders in Robinson-Patman Act cases.

In *Communications Workers of America* v. *National Labor Relations Board*, 362 U.S. 479 (1960), this Court unanimously held that a respondent could *not* be sweepingly ordered to cease and desist from violating the National Labor Relations Act as to a named employer and "any other employer," when the record disclosed no violation with respect to any but the named employer and there was no "generalized scheme" of illicit activity to support an omnibus prohibition. *Id.* at 481. Holding the agency without authority to issue such a blanket injunction in those circumstances, the Court accordingly modified the order by striking the words "or any other employer."

The *Communications Workers* rationale, rejecting blanket and *factually unsupported* administrative injunctions regulating a respondent's conduct towards all the world, has been applied by numerous appellate decisions modifying agency orders.[20] With seeming

[19] See Remarks of William C. Kern, Commissioner, Federal Trade Commission, before the Mechanical Contractors Associations of Texas, Inc., p. 9 (Jan. 14, 1961), disclosing that "The file was studied by the Antitrust Division, which concluded that the Court of Appeals was correct and the Commission was wrong, and it recommended that the Solicitor General not seek review by the Supreme Court."

[20] *E.g.*, *National Labor Relations Board* v. *Ochoa Fertilizer Corp., et al.*, 283 F.2d 26 (1st Cir. 1960); *National Labor Relations Board* v. *Brandman Iron Co.*, 281 F.2d 797 (6th Cir. 1960); *National Labor Relations Board* v. *Plumbers Local 176*, 280 F.2d 441 (1st Cir. 1960).

consent of the Labor Board,[21] this principle rejects cease and desist orders which sweepingly reach out *beyond the controversy and record* to enjoin activities relating to "any other" person.

Such limitations on the scope of administrative orders are as appropriate to FTC as to NLRB enforcement.[22] A chronic or "generalized scheme" of misconduct, whether flouting the labor or the trade regulation laws, may well warrant a broad prohibition to bar evasion or recidivism whose threat is inferable from the character of the past offense. In such cases of "utter disregard of law," justice and equity may well "call for repression by sterner measures than where the steps could reasonably have been though-

---

[21] See *National Labor Relations Board* v. *Plumbers Local 476*, No. 39, O.T. 1961, Pet. p. 4 n. 3 (accepting modifications with respect to union misconduct toward "any other" primary employer.)

[22] The FTC brief's attempted distinction between orders against large labor unions and small business firms (Br., pp. 36-37) is spurious. The *Communications Workers* principle applies not only to limit injunctions against a "national union" having "participated only indirectly" in the violations (Br., p. 36), but *as applied by the NLRB* governs also small union locals directly responsible for the charged violation. See *National Labor Relations Board* v. *Plumbers Local 476*, No. 39, O.T. 1961, *supra* note 21.

Moreover, the record here *disproves* the asserted "natural inference" that respondent "was ready" to violate the law as to others, there being "nothing peculiar to the relations" among Canada Foods and Smucker (Br., p. 37), since he was *exonerated* of any possible violation other than the unique Canada Foods/Smucker transaction by the FTC itself (O.R. 21), and no possible other misconduct was ever hinted.

Indeed, to the extent *any* distinction in principle exists, a broad injunction is surely more necessary to protect the public from the threat of further illegal coercion by a powerful national union than from the perils of a small food broker's fee reduction in a sale of apple concentrate.

permissible." *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 429 (1957); *United States* v. *United States Gypsum Co.*, 340 U.S. 76, 89-90 (1950). See also *Federal Trade Commission* v. *Mandel Brothers, Inc.*, 359 U.S. 385, 393 (1959) (more than 200 violations in "extensive" misconduct.) A broad injunction may also be appropriate if guilt is not contested, inviting a presumption that the full facts would have shown the violation in its most obnoxious cast. *E.g., Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470 (1952); compare *National Labor Relations Board* v. *Express Publishing Co.*, 312 U.S. 426, 437-438 (1941).

But where, as here, the controversy concerned only an isolated arrangement in a close case, the order's limitation to trade actions with the implicated parties is no more restricted than the FTC's own past orders which have been confined to the implicated parties without reaching out to blanket "any others."[23]

[23] *E.g., Charles V. Herron*, 30 F.T.C. 445, 451 (1940); *Mississippi Sales Co.*, 30 F.T.C. 1282, 1297 (1940); *Rogers Parvin & Co.*, 28 F.T.C. 1429, 1444 (1939); *Quality Bakers of America*, 28 F.T.C. 1507, 1525 (1939); *American Oil Co.*, 29 F.T.C. 857, 866 (1939); *C. E. Anthony Co.*, 29 F.T.C. 922, 929 (1939), 30 F.T.C. 1103 (1940); *Fruit & Produce Exchange*, 30 F.T.C. 224, 233 (1939); *Golf Ball Mfrs.' Ass'n*, 26 F.T.C. 824, 850 (1938); *Webb Crawford Co.*, 27 F.T.C. 1099, 1116 (1938); *Oliver Brothers, Inc.*, 26 F.T.C. 200, 214 (1937).

Currently, however, the Commission is issuing blanket orders, in the words of Section 2(c) and of universal scope as to parties, as a matter of routine. Unlike the NLRB, which has adopted a policy of entering broad orders only in *particular* and *appropriate* cases, (see NLRB Brief, p. 9, in *National Labor Relations Board* v. *Ochoa Fertilizer Corp.*, No. 37, O.T. 1961), the FTC issues broad orders wholesale and in bulk—as reflected in 45 such Section 2(c) orders issued in one day, May 19, 1961.

The undocumented claim that "a limited order would not effectively cure the ill effects of the illegal conduct" (FTC Br., p

What is more, the courts have marked out the proper scope of FTC injunctions as being "specifically aimed at the pricing practices found unlawful" so as to prevent "like and related acts," *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 52 (1948); *Federal Trade Commission* v. *Mandel Brothers, Inc.*, 359 U.S. 385, 392-393 (1959); and have disapproved vague prohibitions "in the very words of the statute" instead of "the particular practice found to violate the statute." *Swanee Paper Corp.* v. *Federal Trade Commission*, 291 F.2d 833, 838 (2d Cir. 1961); *cf.* also *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U.S. 441, 455-456 (1922); *National Labor Relations Board* v. *Express Publishing Co.*, 312 U.S. 426, 436-438 (1941); *May Department Stores Co.* v. *National Labor Relations Board*, 326 U.S. 376, 388-392 (1945); *National Labor Relations Board* v. *Crompton-Highland Mills, Inc.*, 337 U.S. 217, 226 (1949).

Such limitations, which fit the order to the offense, safeguard the judiciary's restricted role in administrative law enforcement. The question is not whether a respondent should be left "free to commit similar violations" with others (FTC Br., p. 31)—for the FTC

---

31) is also belied by Commission practice respecting orders under Section 5 of the Federal Trade Commission Act, which are typically confined to the particular practice found to violate the statute and the particular parties implicated by the record. See, *e.g.*, *Franklin Institute*, 55 F.T.C. 14, 16-17 (1958); *Holland Furnace Co.*, 55 F.T.C. 55, 90-91 (1958); *World Wide Brokerage Corp.*, 55 F.T.C. 97, 98-99 (1958); *Dundee Electronics Co.*, 55 F.T.C. 100, 101 (1958); *Bantam Books, Inc.*, 55 F.T.C. 779, 788 (1958); *Zoysia Farm Nurseries, Inc.*, 55 F.T.C. 803, 804-805 (1958); *Atlantic Sewing Stores, Inc.*, 54 F.T.C. 174, 180-181 (1957); *Morse Sales, Inc.*, 54 F.T.C. 193, 197 (1957); *Carl Co.*, 54 F.T.C. 243, 244-245 (1957); *Exposition Press, Inc.*, 54 F.T.C. 908, 910-912 (1958).

may prosecute any violations if they ever occur. Rather, blanket orders compel a respondent to conduct his business under judicial supervision in the shadow of contempt proceedings. *E.g., In re Whitney & Co.*, 273 F.2d 211 (9th Cir. 1959); *cf. May Department Stores Co. v. National Labor Relations Board*, 326 U.S. 376, 388 (1945); *J. I. Case Co. v. National Labor Relations Board*, 321 U.S. 332, 341 (1944). In the end, such orders defeat "proper judicial administration," for "the duty of enforcing the prohibitions [of the Act as to respondent] is shifted from the Commission to the federal courts, which may in the future be forced to decide the very issues that Congress has entrusted the Commission to determine." *Swanee Paper Corp. v. Federal Trade Commission*, 291 F.2d 833, 838 (2d Cir. 1961), citing *Federal Trade Commission v. Morton Salt Co.*, 334 U.S. 37 (1948); *Asheville Tobacco Board of Trade, Inc., v. Federal Trade Commission*, 1961 CCH Trade Cases ¶70, 113 (4th Cir. Sept. 20, 1961).

Above all, careful cease and desist orders by the FTC are imperative for the rational implementation of the Robinson-Patman Act.[24] The puzzling obscurities of this Act have been perceived by this Court, which has cautioned that its loose or undiscerning enforcement can easily overstep the Congressional intendment so as to thwart rather than to promote overall antitrust

[24] As noted by the Second Circuit's *Swanee* opinion, the recent reinforcement of Clayton Act sanctions governing FTC orders was coupled with a Congressional admonition to "make a continuous effort to issue orders that are as definitive as possible," and stressed the correction of their deficiencies on judicial review. 291 F.2d 833, 837 n. 4 (1961).

objectives. *E.g., Automatic Canteen Co. v. Federal Trade Commission*, 346 U.S. 61, 63, 65, 74 (1953).[25]

C. Since the FTC Had Full Opportunities to Consider the Scope of Its Order, the Court's Statutory Right to Modify Is Clear.

No controversy exists as to the principles of "orderly procedure and good administration" which accord administrative agencies the right to pass on objections to their rulings in the first instance, thus permitting the FTC to ply its "expertise" and to avert needless corrections on judicial review. (See FTC Brief, pp. 15-18 and cases cited.) This doctrine is premised on the desirability of the agency's initial expert evaluation of the issues before they are exposed to limited scrutiny by the courts. (*Ibid.*)

But here the FTC *did* consider its order in relation to its underlying findings, and actually passed up further opportunities for administrative consideration upon remand from this Court's decision on the merits. Admittedly the FTC "does address itself to the scope of a proposed order on appeal from the trial examiner's decision" irrespective of the respondent's contentions. (Br., p. 19) As a matter of fact, in "the present case the Commission concluded that the order recommended by the examiner was the proper

[25] For example, on May 19, 1961, the Commission simultaneously issued forty-five cease and desist orders in the broad text of the Brokerage Clause against members of the citrus fruit industry. The collective impact of these orders, which prohibit brokerage fee reduction or elimination, creates an industry-wide abolition of fee competition under Robinson-Patman aegis and policed by the courts—comparable to other industries' private arrangements prosecuted under the Sherman Act as undue restraints of trade. *E.g., United States v. National Ass'n of Real Estate Boards*, 339 U.S. 485 (1950); *United States v. American Ass'n of Advertising Agencies, Inc.*, 1956 CCH Trade Cases ¶68, 252 (S.D. N.Y. 1956).

remedy." (*Ibid.*) When respondent's post-remand motion below *twice* suggested possible further administrative consideration of the order in light of this Court's opinion (R. 29, 49-50), the FTC countered with requests for the order's summary judicial affirmance. (R. 37) [26]

Having considered the scope of its challenged order, and having rejected further opportunities to do so, the FTC can hardly complain of any foreclosure of its procedural rights when the court below modified the order at the time of its affirmance.[27]

---

[26] The untenable and extreme nature of the FTC's previous *challenge* to the Court of Appeals' *power* to entertain respondent's contentions is highlighted by the Solicitor General's brief, which now concedes the court's *right* to modify the order and only questions its exercise in light of the facts of this case. (Br., pp. 10, 15, 20) Actually, the first affirmative justification tendered for the FTC's order appears in the Solicitor General's brief on behalf of the Commission before this Court.

[27] Furthermore, the Commission itself was at all times free to revise its order after the remand if it so wished. See *Swance Paper Corp.* v. *Federal Trade Commission*, 291 F.2d 833, 838 (2d Cir. 1961). In other cases, the FTC has voluntarily revised its orders during judicial review, *e.g.*, *Maryland Baking Co.* v. *Federal Trade Commission*, 243 F.2d 716, 719 (4th Cir. 1957), including partial abandonment or revisions of an order during *this* Court's review. See *Federal Trade Commission* v. *Standard Oil Co.*, 355 U.S. 396 (1958), Reply Brief for FTC, pp. 31-32; *Federal Trade Commission* v. *Mandel Brothers, Inc.*, 359 U.S. 385, 393 (1959).

Its brief's attempted distinction of *Swance* by reference to the 1959 Clayton Act amendments, 15 U.S.C. § 21, (Br., p. 23 n. 8) is baseless, since prior thereto the Commission could also modify its own orders, before or after their presentation for judicial review. See FTC Rules of Practice, 16 C.F.R. § 3.27 (1960), and, *e.g.*, *National Biscuit Co.*, 50 F.T.C. 932 (1954).

Significantly, not a single case cited by the FTC brief on this point involved a situation where the agency, as here, both *could* and *did* give *prior* consideration to the aspect of a ruling which

Against this background, and in light of respondent's contest of the FTC's charges at every turn, the Commission's invocation of the "principle of exhaustion of administrative remedies" (Br., p. 17) is surely misplaced.

The Commission's decision and order was challenged throughout the administrative proceeding, and at each stage of judicial review. Respondent (1) denied the Commission's charges at the administrative level (O.R. 6); (2) submitted a proposed order of dismissal to the hearing examiner (O.R. 173); (3) appealed to the Commission from the examiner's initial decision and order (O.R. 203); (4) declined compliance with the Commission's order pending judicial review (O.R. 203, 211-212); and (5) filed a statutory petition praying that the order be set aside as defective, apart from the proceeding's substantive failings, because it was

---

was revised by the reviewing court. In some, the respondent raised *no contest* whatsoever to the adverse ruling at the administrative level, *e.g.*, *United States* v. *Tucker Truck Lines, Inc.*, 344 U.S. 33 (1952); *National Labor Relations Board* v. *Cheney California Lumber Co.*, 327 U.S. 385 (1946); in others the respondent never tendered the particular issue to the agency for its consideration in any form, *either* before *or* during judicial review, *e.g.*, *Moog Industries, Inc.* v. *Federal Trade Commission*, 355 U.S. 411 (1958); *National Labor Relations Board* v. *United Mine Workers*, 355 U.S. 453 (1958); *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492 (1955); *National Labor Relations Board* v. *Seven-Up Bottling Co.*, 344 U.S. 344 (1953); *National Labor Relations Board* v. *Enterprise Ass'n*, 285 F.2d 642 (2d Cir. 1960).

Compare also the Solicitor General's position in *National Labor Relations Board* v. *Ochoa Fertilizer Corp.*, No. 37, O.T. 1961, Brief, p. 8, basing the right to judicial modification of Labor Board orders on the question of whether the Board "had considered the scope of the orders in the light of the evidence and findings of record before arriving at its ultimate decisions."

"vague, exceeds the statutory limits of Section 2(c), and as applied would conflict with the Sherman Act." (O.R. 214) [28] Subsequent to this Court's divided decision on the merits, which remanded the proceeding for further appropriate action, respondent once again contested the basis and scope of the order in light of the law of the case as enunciated by this Court. (R. 26, 49)

To be sure, respondent's post-remand motion in 1960 amplified the original challenge to the order once Section 2(c) had for the first time been interpreted by this Court. Tracing the conflict between the absolute and blanket prohibitions of the order and the law of the case as set forth by this Court's majority opinion, the motion also advanced the supervening legal development of this Court's *Communications Workers* decision in 1960 which modified an omnibus Labor Board order in the absence of a "generalized scheme" of dereliction.[29]

But for the FTC to claim inadequate "notice" on this record as to respondent's challenge to the order,

[28] Before the Court of Appeals, the briefs treated the impact of the FTC's order on competition in food distribution, as well as the Commission's preoccupation with a picayune and isolated transaction affecting only the particular parties involved. (See Pet. Br., pp. 27-33, Reply Br., pp. 7, 14-16) Respondent expressly contended, and the FTC disputed, that the sweeping terms of the original cease and desist order improperly barred normal competitive price reductions to *all* customers. (Reply Br., pp. 1, 7, 15; FTC Br., pp. 39-42)

[29] See also *Swance Paper Corp.* v. *Federal Trade Commission*, 291 F.2d 833 (2d Cir. 1961).

due to a missing so-called "particularized objection," (Br., p. 19) is to exalt sheerest technicality.[30]

Nor can lack of so-called "particularized objection" curtail a reviewing court's power to consider *supervening* circumstances which impugn an administrative order. For "When circumstances do arise after the Board's order has been issued which may affect the propriety of enforcement of the order, the reviewing court has discretion to decide the matter itself or to remand it to the Board for further consideration." *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 331 U.S. 416, 428 (1947); *cf. Johnson* v. *Shaughnessy*, 336 U.S. 806, 818 (1949); *Hormel* v. *Helvering*, 312 U.S. 552, 557 (1941); *Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U.S. 538 (1941).

Finally, regardless of "particularized objection" at the administrative level, courts admittedly *can* and *do* direct the modification of orders which exceed the agency's "authority" (FTC Br., p. 21)[31]—whenever

---

[30] Compare *May Department Stores Co.* v. *National Labor Relations Board*, 326 U.S. 376, 386 n. 5 (1945). It is relevant in this connection that the FTC Rules of Practice at the time of this review did not require "exceptions" to hearing examiner's rulings, providing instead a generalized "appeal" procedure whereby the agency could "exercise all the powers which it could have exercised if it had made the initial decision." 16 C.F.R. § 3.24(a) (1960). To that extent, therefore, the FTC could give consideration to all issues presented by the examiner's rulings, regardless of any particularized "exceptions" (see FTC Br., p. 19), unlike NLRB practice where the Board *cannot* consider points unless *specifically raised in exceptions* to the examiner's findings. See Brief in *National Labor Relations Board* v. *Ochoa Fertilizer Corp.*, No. 37, this Term, pp. 10-12.

[31] Most recently, see *Swanee Paper Corp.* v. *Federal Trade Commission*, 291 F.2d 833, 838 (2d Cir. 1961). See also *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U.S. 441 (1922); *Bork Mfg. Co.* v. *Federal Trade Commission*, 194 F.2d 611 (9th Cir.

the legal basis for the order is exposed as defective in the course of judicial review. Nor does it matter whether the modification follows express "reversal of the finding upon which the changed portion of the order rested" (FTC Br., p. 22 n. 7 and cases cited), or, as here, effectuates the law of the case when enunciated by the reviewing court. *National Labor Relations Board* v. *Crompton-Highland Mills, Inc.*, 337 U.S. 217, 226 (1949); *National Labor Relations Board* v. *Express Publishing Co.*, 312 U.S. 426, 435-438 (1941); *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U.S. 441, 455-456 (1922); *Swanee Paper Corp.* v. *Federal Trade Commission*, 291 F.2d 833, 838 (2d Cir. 1961).[32]

CONCLUSION

This Court recently observed that "One cannot generalize as to the proper scope of these orders. It depends on the facts of each case and a judgment as to the extent to which a particular violator should be

---

1952); *R. J. Reynolds Tobacco Co.* v. *Federal Trade Commission*, 192 F.2d 535 (7th Cir. 1951); *Folds* v. *Federal Trade Commission*, 187 F.2d 658 (7th Cir. 1951); *Parker Pen Co.* v. *Federal Trade Commission*, 159 F.2d 509 (7th Cir. 1946); *Milk and Ice Cream Can Institute* v. *Federal Trade Commission*, 152 F.2d 478 (7th Cir. 1946); *Gelb* v. *Federal Trade Commission*, 144 F.2d 580 (2d Cir. 1944); *Etablissements Rigaud, Inc.* v. *Federal Trade Commission*, 125 F.2d 590 (2d Cir. 1942); *Standard Container Mfgrs.' Ass'n* v. *Federal Trade Commission*, 119 F.2d 262 (5th Cir. 1941).

Contrary to the FTC brief (p. 22 n. 7), one aspect of the *Reynolds* order modification by the court had *not* been raised at the agency level.

[32] *None* of these cases reveals a specific challenge before the agency *to the aspect of its order modified by the court*. The Commission brief's understanding of the *Express Publishing* case (Br., p. 26 n. 12), to the extent it may differ, is inaccurate.

fenced in." *Federal Trade Commission* v. *Mandel Brothers, Inc.*, 359 U.S. 385, 392 (1959).

On the particular facts of *this* case, the partial modification of the Commission's blanket order by the Court of Appeals was obviously correct. In any event, the Court of Appeals did not abuse its statutory reviewing powers by modifying an order clearly exceeding the exigencies of this case—in the absence here of any "generalized scheme" of illicit activity to warrant an omnibus prohibition extending beyond the narrow violation which was ultimately found in a borderland area of Robinson-Patman jurisprudence.

Accordingly, the judgment below should be affirmed.

Respectfully submitted,

FREDERICK M. ROWE
JOSEPH DUCOEUR

of

KIRKLAND, ELLIS, HODSON,
CHAFFETZ & MASTERS
800 World Center Building
Washington 6, D. C.

HAROLD ORLINSKY
FRED HERZOG
11 South LaSalle Street
Chicago 3, Illinois

Attorneys for Respondent

October 26, 1961